

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

**In the Matter of:**

**FALCON AIR EXPRESS, INC.**

FAA Order No. 99-13

Served: December 22, 1999

Docket No. CP97SO0073

**DECISION AND ORDER**<sup>1</sup>

This case involves the alleged failure of Falcon Air Express (Falcon), a supplemental air carrier, to keep an accurate passenger list. After the law judge found a violation of 14 C.F.R. § 121.697(e)(2)<sup>2</sup> and assessed a \$5,000 civil penalty,<sup>3</sup> Falcon appealed. This decision denies Falcon's appeal.

On July 31, 1996, during a routine inspection, FAA inspectors found a discrepancy regarding a Falcon flight on May 20, 1996, from the Dominican Republic to the United States.<sup>4</sup> Although the weight and balance manifest stated that there were a total of 135 passengers, the passenger list contained only 84 names.<sup>5</sup> When the

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<sup>1</sup> The Administrator's civil penalty decisions are available on LEXIS, WestLaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 64 Fed. Reg. 58879, 58895 (November 1, 1999).

<sup>2</sup> See *infra* note 19.

<sup>3</sup> A copy of the law judge's written initial decision is attached.

<sup>4</sup> The flight was from Punta Cana in the Dominican Republic to Miami, Florida. Tr. 16-17; Complainant's Exhibit C-1.

<sup>5</sup> Tr. 22; Complainant's Exhibits 2 & 3.

inspectors asked where the rest of the names were, a Falcon employee replied, "[T]hat's all there is."<sup>6</sup>

Falcon's Operations Director, however, said he would obtain a complete list and fax it to the inspectors in about 10 to 15 minutes.<sup>7</sup> One of the inspectors told him to send it the following day because it was nearing the end of his workday.<sup>8</sup>

Falcon contacted Aerolineas Argentinas, the airline for whom Falcon conducted the flight, to obtain a complete list of passenger names.<sup>9</sup> The list from Aerolineas contained 139 names.

The morning after the inspectors' initial visit, on August 1, 1996, Falcon faxed the new passenger list to the inspectors' office, but apparently the fax was not given to the inspectors.<sup>10</sup> In any event, the inspectors returned to Falcon later that day to give the carrier another opportunity to explain the discrepancy.<sup>11</sup>

The inspectors met with Falcon's President and its Operations Director and were given the new list.<sup>12</sup> Neither Falcon's President nor its Operations Director could explain, however, why the number of names on the new list differed from that on the weight and balance manifest, or which individuals were actually aboard the flight.<sup>13</sup>

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<sup>6</sup> Tr. 17, 18; Complainant's Exhibit 1.

<sup>7</sup> Tr. 48.

<sup>8</sup> *Id.*

<sup>9</sup> Tr. 24-25; Complainant's Exhibits 4 and 5.

<sup>10</sup> Tr. 49, 54, 105.

<sup>11</sup> Tr. 24; 49; Complainant's Exhibits 4 & 5.

<sup>12</sup> Tr. 24.

<sup>13</sup> Tr. 25, 37.

The inspectors sent Falcon a letter of investigation.<sup>14</sup> The letter gave the carrier the opportunity to present any arguments or records in its defense. Although Falcon received the letter, which was sent by certified mail, it did not respond.<sup>15</sup>

After Falcon received a notice of proposed civil penalty in December 1996, Falcon's President learned how to decode the passenger list from Aerolineas.<sup>16</sup> Some of the entries were actually no-shows and duplicates,<sup>17</sup> yielding a passenger count of 135, matching the number on the weight and balance manifest.<sup>18</sup>

Complainant filed a complaint alleging that Falcon violated 14 C.F.R. § 121.697(e)(2), which requires supplemental air carriers to retain certain flight records for 3 months.<sup>19</sup> Complainant sought a \$7,500 civil penalty.

The law judge found that Falcon committed the violation. He stated that there are two reasons for the requirement to keep a passenger list: first, to help determine the aircraft's correct weight and balance before takeoff; and second, to permit contact of

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<sup>14</sup> Tr. 30.

<sup>15</sup> *Id.*

<sup>16</sup> Tr. 50.

<sup>17</sup> Tr. 51.

<sup>18</sup> *E.g.*, "ZZ" meant the passenger was a no-show. Tr. 70.

<sup>19</sup> 14 C.F.R. § 121.693(e) requires air carriers to retain a list of passenger names either as a part of a load manifest or by other means. Section 121.697(e)(2) provides that air carriers must retain the load manifest and other paperwork at their "principal base of operations ... for at least 3 months." Also, Falcon's General Operations Manual states that Falcon's "filed paperwork ... for at least 3 months must consist of [among other things a] Passenger List." (Complainant's Exhibit 6; Tr. 65.) In its appeal brief, Falcon states that it "does not contest" Complainant's allegation that the regulations required it to retain a list of passengers. (Appeal Brief at 2.)

loved ones in case of emergency.<sup>20</sup> The law judge held that the passenger list must be both accurate and readable without special knowledge.

According to the law judge, not only were both Falcon's President and Operations Director unaware of the meaning of the codes, but no evidence suggested that either was aware, at least initially, that codes were even used. As a result, the two men could not ensure that their employees would contact the proper people in case of emergency. Further, according to the law judge, the weight and balance manifest, which is crucial to flight safety, could have been inaccurate if personnel unfamiliar with the codes used the list.<sup>21</sup>

The law judge rejected Falcon's contention that if the same name appeared twice, one could safely conclude it was the same person. He pointed out that even Falcon's President had testified that different passengers could have the same name.

As for the sanction, although Complainant requested a civil penalty of \$7,500, the law judge believed \$5,000 more appropriately balanced the gravity of the violation against the mitigating circumstances.<sup>22</sup> On the one hand, the law judge said, the violation was serious because it compromised the humanitarian purpose of the passenger list requirement and introduced unnecessary risk. On the other, the carrier had a method in place to contact loved ones in case of emergency, and the captain was able to calculate the weight and balance correctly.

Dissatisfied with the law judge's decision, Falcon filed the instant appeal.

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<sup>20</sup> Initial Decision at 3.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.*

Complainant has not appealed the law judge's reduction in its requested sanction.

On appeal, Falcon protests the allegation that it operated the flight "with an unknown number of passengers on board."<sup>23</sup> Falcon is correct, and Complainant does not dispute, that prior to takeoff, the crew used the correct number of passengers in the weight and balance calculations.<sup>24</sup> This provides no basis for reversal, however, because the law judge did not find otherwise.

Further, the allegation that Falcon operated the flight "with an unknown number of passengers on board" may simply have intended to convey that *after* the flight, Falcon could not say with certainty how many passengers were on board, which is true. Faced with varying counts – either 84, 135, or 139 passengers – neither Falcon's President nor its Operations Director could tell the inspectors which count was correct and why.

Falcon also disputes the law judge's statement that the weight and balance calculations could have been inaccurate.<sup>25</sup> According to Falcon, the passenger list has nothing to do with counting heads in the aircraft and performing the weight and balance calculations.<sup>26</sup> Falcon is correct that the purser testified that he obtained the number of passengers for the weight and balance manifest by physically counting the passengers in their seats.<sup>27</sup> He stated, "We have a procedure that we conduct a head count," which he

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<sup>23</sup> Appeal Brief at 8, referencing Complaint ¶ 2.

<sup>24</sup> In its reply brief, Complainant concedes that "[t]he FAA does not contend that an inaccurate passenger list was used in the weight and balance calculations ...." Reply Brief at 13 n.3.

<sup>25</sup> Appeal Brief at 13.

<sup>26</sup> Appeal Brief at 13.

<sup>27</sup> Tr. 41.

followed.<sup>28</sup> Thus, the evidence indicates that the crew did not rely on a list of passenger names to calculate the aircraft's weight and balance.

There is evidence in the record, however, that supports the law judge's finding that the weight and balance calculations *could* have been inaccurate. Falcon's own Safety Director testified as follows:

Q: Why are the records kept of all the people who book on a flight?

A: ... I'm going to answer this on behalf of my years with the National Transportation Safety Board. One of the reasons is weight and balance ....<sup>29</sup>

This testimony suggests that it was indeed possible for a passenger list (erroneous due to incompleteness or due to a failure to indicate that it was encoded) to be used to calculate the aircraft's weight and balance, if not on the flight at issue, then on other Falcon flights.

In any event, even if the law judge erred in finding it possible for the passenger list to be used to calculate the aircraft's weight and balance, the error would be harmless. A safety issue is still present because Falcon was unable to tell the inspectors the correct number of passengers aboard the flight. As Complainant points out, if a passenger list contains too few names, then rescuers, believing all passengers are accounted for, might end a post-accident search before finding all the survivors. If, on the other hand, the list contains too many names, then rescuers could be endangered as they search for passengers who were not on the flight.<sup>30</sup>

Falcon argues that the 139-passenger list was indeed accurate because the codes

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<sup>28</sup> *Id.*

<sup>29</sup> Tr. 68.

<sup>30</sup> Reply Brief at 12.

indicated which passengers made the flight.<sup>31</sup> In a sense, Falcon is correct. But Falcon's management did not know the code, or even that the list was encoded. A passenger list, no matter how accurate, is of little use if the carrier cannot decode it without delay.

Falcon argues that its President and Operations Director do not need to be able to explain technical matters such as how to repair an engine or how to decipher codes on passenger lists.<sup>32</sup> It argues that various other Falcon personnel knew the codes, and in case of emergency, would have been involved.<sup>33</sup> The facts of this case directly contradict Falcon's argument. When a question arose as to how many passengers were on the flight, Falcon's President and Operations Director did not involve personnel who knew the codes. Twice the inspectors visited Falcon, asking how many and which passengers were aboard the flight, and twice they left Falcon without the information they requested.

Regarding the sanction, Falcon asserts that no civil penalty should be assessed due to the misunderstanding regarding the codes. The misunderstanding, however, is not a valid basis for eliminating the sanction. This is not a case in which the violation occurred through no fault of the respondent. A civil penalty needs to be assessed in this case to achieve the goal of compliance -- to ensure that in an emergency, carriers are able to provide the number and names of passengers without confusion or delay.

Finally, Falcon argues that the penalty should be limited to \$1,000 because the complaint stated as follows:

Pursuant to 49 USC § 46301(a)-(d), Respondent is subject to a civil

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<sup>31</sup> Appeal Brief at 10, 11.

<sup>32</sup> Appeal Brief at 12.

<sup>33</sup> Appeal Brief at 11.

penalty not to exceed \$1,000.00 for each of the violations alleged.<sup>34</sup>

As Complainant explained at the hearing, the amount was a typographical error, and it should have read \$10,000.<sup>35</sup>

The sanction will not be reduced to \$1,000. As the law judge noted, both the Notice of Proposed Civil Penalty and the Final Notice of Proposed Civil Penalty correctly cited the statute's \$10,000 maximum.<sup>36</sup> In addition, the complaint itself indicated in two separate places that Complainant was seeking a civil penalty of \$7,500.<sup>37</sup> If Falcon was confused about the statutory maximum, it could have looked up the provision (which was specifically cited in the complaint) to see that it provided as follows:

A person operating an aircraft for the transportation of passengers or property for compensation ... is liable to the Government for a civil penalty of not more than \$10,000 ....

49 U.S.C. § 46301(a)(2). Falcon has not shown that it was harmed in any way by the typographical error. Therefore, the civil penalty will not be reduced to \$1,000.

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<sup>34</sup> Complaint ¶ 7.

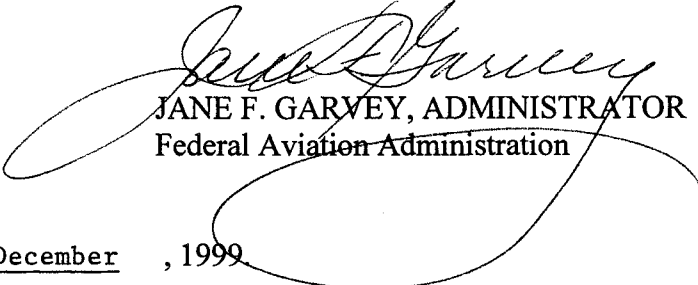
<sup>35</sup> Tr. 118.

<sup>36</sup> Initial Decision at 1 n.1.

<sup>37</sup> Complaint ¶¶ 1, 8.



In summary, Falcon's appeal is denied and the law judge's decision assessing a \$5,000 civil penalty is affirmed.<sup>38</sup>



JANE F. GARVEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 21st day of December, 1999.

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<sup>38</sup> Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1999).